UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 29

DISH NETWORK CORPORATION, Respondent and and COMMUNICATIONS WORKERS OF AMERICA, LOCAL 6171, and ERIC SUTTON, An Individual, Charging Party Charging Party.	)	Case Nos. 16-CA-062433 16-CA-066142 16-CA-068261

DISH NETWORK CORPORATION'S REPLY TO THE UNION'S EXCEPTIONS TO THE DECISION ISSUED BY ALJ RINGER

And now comes DISH Network LLC ("DISH") files the following reply to CWA, Local 6171's ("Union") Exceptions to the decision issued by ALJ Robert A. Ringler ("ALJ") on November 14, 2012, stating as follows:

I. Other Than Timing, The Evidence Does Not Support A Finding of Substantial Union Animus, As Claimed By The Union.

The Union's position appears to be that Mr. Tavares' (1) efforts toward helping to organize DISH's Farmer's Branch location in late 2010; (2) his testimony in a Board proceeding on May 23, 2011; and (3) his participation in two (2) bargaining sessions were the motivating factors behind his termination, proving the existence of "substantial" Union animus.

The principal problem with Union's argument is that it fails to account for several additional and important facts. For example, Mr. Tavares testified that the extent of his organizing activity was to collect five (5) signatures for the authorization petition in late 2010.

(Hearing Transcript ("H.T.") p. 137: lines 18-21; p. 233: line 5.) Mr. Tavares admitted that none of his managers knew that he was involved in any of his organizing activities. (H.T. p. 137: lines 22-24.) It is also important to note that neither IM Michael Durham ("Mr. Durham"), nor GM Gabriel Gonzales ("Mr. Gonzales"), both of whom initiated Mr. Tavares' termination, were employed at the Farmer's Branch location during the union organizing effort and knew nothing about the organizing effort. In fact, GM Gonzales testified that he did not have any involvement with the union until after he started to manage the Farmer's Branch location in the Spring of 2011. (H.T. pp. 437-441.)[1] Mr. Durham, who the ALJ found to be particularly credible (Op. p. 7, Lines 10-14), testified that he believed Mr. Tavares was "a good human being" whom he (Mr. Durham) treated with "the utmost respect." (H.T. p. 530: lines 20-25; p. 531: line 1.) Thus, it only stands to reason that if neither of these individuals knew of Mr. Tavares' organizing efforts, it could not have been a factor they considered when they decided to terminate Mr. Tavares' employment.

Likewise, the Union's contention that Mr. Tavares' participation in two (2) bargaining sessions resulted in his termination is also easily discounted. Mr. Tavares testified that he became the bargaining representative in March, 2011, replacing the previous representative who had stepped down. (H.T. p. 155: lines 17-23.) After becoming the bargaining representative, he asked for time off on two (2) occasions to attend bargaining sessions. Both days were granted by Mr. Durham, even though Mr. Tavares' requests were made just one or two days in advance of the actual bargaining sessions. (H.T. pp. 215-216: lines 21-25 and 1-2.) Mr. Tavares also testified that none of DISH's managers ever talked to him about the fact that he had become the Union's representative or made any kinds of threats against him for his participation in Union

[1] Mr. Gonzales had been the General Manager of the Denton and McKinney offices. He added Farmer's Branch as a third office in February, 2011. (H. T. p. 437.)

activities. (H.T. p. 215: lines 11-20.) Mr. Tavares further testified that the negotiations that he attended were cordial and the parties exhibited no animosity towards one another at the bargaining table. (H.T. p. 216: lines 3-9.)

Also, it is important to note that Mr. Taveras was not by any means a stellar employee prior to the time the he testified at the May, 2011 hearing. The evidence showed that Mr. Taveres had been the recipient of "coaching plans" in February and May for work deficiencies, productivity and poor customer service, and was actually on a final warning for attendance problems. (Op. p 6, lines 33-36.) This misconduct occurred prior to the conduct which eventually resulted in his termination.

In conclusion, ALJ Ringlers analysis was spot on. He conducted a thorough examination of the record within the framework of *Wright Line*. He found that the General Counsel ("GC") met his burden of a *prima facie Wright Line* showing because Mr. Taveras had engaged in certain Union activities and that DISH had knowledge of those activities. He did so even though he determined that DISH "was minimally aware that he was serving on the bargaining team and appeared at the ULP hearing." (Op. pp. 10-11, lines 45-1.) The ALJ's use of the word "minimally" was justified by the testimony of Taveras' supervisors, Gonzalez and Durham, who both testified that they were not involved in the prior hearing at which Taveras testified, and were not privy to the negotiations that Taveras attended, other than to grant him time off that he had requested at the last minute. Hence, the ALJ was acted reasonably in concluding that although both individuals had some limited knowledge of Taveras' involvement because they approved his time off to attend bargaining sessions, they generally did not know about Taveras' history with Union organizing or his testimony at the previous trial. Since these were the two supervisors who ultimately made the decision to terminate Taveras, the ALJ's statement that

DISH was "minimally aware" was clearly correct. Indeed, Taveras himself offered no testimony that Gonzalez or Durham ever made any statements to him indicating that they knew of or even cared about his involvement with the Union. Nevertheless, ALJ Ringler did find a *prima facie* case, which required DISH to proffer evidence that it would have made the same decision, absent Taveras' protected conduct.

Contrary to the Union's opinion, the facts of this case do not come close to those identified in *Bally's Park Place, Inc.*, 355 N.L.R.B. 1319 (2010), where the Board found that the Employer's managers had unlawfully told the employee on three previous occasions that he could not discuss the Union with other employees on the casino floor, and he received a written warning for doing so, and the reason for the termination had no real basis in fact since the Employer did not actually have a documented zero tolerance policy upon which it relied at the hearing.

Here, the managers who were involved in the termination had only been in supervision for a short time, and Mr. Taveras himself admitted that they had little knowledge of his Union activities. Mr. Taveras also admitted that DISH took safety very seriously and that he had been given significant training on the importance of working safely. Mr. Tavares received refresher training on the use of Fall Protection in March, 2011, after Mr. Durham and Mr. Gonzalez had taken over as managers of Farmers Branch. (H.T. pp. 204, 449; R-10.) He even admitted that the warnings that he received caused him to begin following the safety policy. (H.T. p. 171, line 18).

II. Taveras Was A Repeat Safety Offender Who Received A Final Written Warning.

The Union argues that the ALJ's analysis is flawed because he failed to find that Taveras was the "only employee fired solely for safety issues". Union Brief at p. 16. The Union is

simply engaged in a game of "hair splitting", as testimony and documents presented at trial clearly supported the ALJ's conclusion that other technicians, as well as supervisors, were disciplined or terminated or resigned for safety related reasons after Mr. Gonzalez took over the Farmer's Branch location, in February, 2011. The reason for Mr. Gonzalez focus on safety had nothing to do with the Union, but was directly related to the fact that the Farmer's Branch operation was, for lack of a better term, a mess, and ranked 160 out of 163 locations based upon certain company metrics, including safety. (Op. p. 4, ftnte 13.)

The testimony at trial presented an ugly picture of "inmates running the asylum" prior to Mr. Gonzalex' arrival, with employees and supervisors alike choosing to ignore DISH's safety policies and protocols, and even going so far as to falsify safety inspection records. To this point, ALJ Ringler noted that "FSM Thompson (a supervisor) credibly testified that he overlooked many safety lapses between 2005-2011, and "brazenly admitted that he created phony safety surveys, which awarded passing grades at jobsites that were never visited." Op. p. 4, lines 1-3. Thompson further testified that he resigned his position because he could not get along with his supervisor Durham, and that "his conflict was partially prompted by the magnified focus on safety policy", which was initiated by Mr. Gonzalez after he took over management of the operation in February, 2011. However, Thompson did admit that Gonzalez' renewed effort to create a safe work environment resulted in a culture change and technicians began to wear their PPE, as required under DISH policies. Op. p. 5, lines 1-15.

It is clear from the record that the Farmer's Branch office was underperforming in every respect, including safety. Mr. Gonzales and Mr. Durham arrived at the facility in the Spring of 2011, and began to implement changes by re-training employees, holding supervisors accountable and enforcing Company policies, including safety policies. These changes were

imposed upon all technicians and supervisors, not just Mr. Tavares. Indeed, the evidence clearly shows that Field Service Manager Rodney Hodge was terminated for poor performance, (H.T. p. 445), and Field Service Manager Mr. Thompson chose to leave DISH because he did not like Mr. Dunham's "my way or the high-way" management style. (H.T. p. 402.)

Likewise, the evidence shows that Mr. Tavares was not the only technician who was disciplined in the Spring of 2011. On April 5, 2011, GC witness Michael Thompson issued a final written warning to Zach Hodges for improper use of a Little Giant Ladder. (H.T. p. 396; R-4.) On April 24, 2011, Mr. Thompson issued a final warning to Ryan Knightstep for failing to wear his PPE. (H.T. p. 397; R-5.) On July 20, 2011, Mr. Thompson issued a termination notice to Eric Sutton for drilling a hole into the back of an electrical outlet. (H.T. p. 398; R-6.). There is no evidence whatsoever that any of this discipline was related to union activities.

Given all of the above, it is apparent that Mr. Tavares was treated consistently with other technicians who violated safe work practices. The only difference between Mr. Tavares and the others is that they took their final warnings seriously, and did not commit additional safety infractions that resulted in their termination. Mr. Tavares failed to heed his warning and, as a result, suffered termination of his employment.

Even Mr. Taveras admitted that he was aware of DISH safety requirements, and the fact that Mr. Gonzalez was serious about safety, as he began to follow the rules, after having received a final warning on June 3, 2012. (Op., p.6, line 10.) Further evidence that Taveras knew about the rules can be gleaned from the fact that he actually passed a safety survey, after having been reprimanded.

The Union attempts to paint a picture that Mr. Taveras was the only person ever terminated for just violating a safety policy. The actual facts reveal a completely different story.

The fact is that Mr. Taveras had received "coaching plans" on February 21 and May 11, concerning serious deficiencies in his work, and on May 18, he received a final written warning for attendance. Although these were not cited as specific reasons for his termination, the fact remains that Mr. Taveras was already operating on "thin ice" when he received his final written warning on June 3, for three (3) separate safety violations: 1) accessing a roof without using "fall protection", a very egregious violation of safety rules due to the fact that significant injuries, or death, can occur as the result of a fall; 2) failing to wear his PPE on May 26, while working on a Little Giant ladder; and 3) working on an extension ladder on June 2, without wearing his PPE. Taveras was specifically warned that, "These are serious safety infractions and Jorge cannot ignore...safety rules." He was also specifically told that further violations would lead to terminations. Op. pp. 5-6, lines 35-10. Mr. Tavares admitted at trial that he was fully aware of the fact that he would be terminated if he experienced any more safety violations. (H.T. p. 204; lines 6-9; p. 249: lines 16-22.)

As ALJ Ringler noted, if DISH were actually out to "get" Mr. Taveras because of his Union activity, it had plenty of opportunity to do so given his workplace conduct up through June 3. The fact is that DISH did not terminate Taveras, but gave him one more chance, and he screwed that one up as well. Indeed, Taveras could have avoided termination had he just done what he had been told on a number of occasions—WEAR HIS PPE. Apparently, either this message did not sink in, or, more likely, Mr. Taveras somehow believed that he was untouchable, and he again was caught on the job, standing on a ladder.....PPE'less.

At trial, Mr. Taveras tried to claim that he was somehow a victim of bad timing as his "bump-cap" fell off of his head just a few seconds before his supervisor arrived to check on the job. ALJ Ringler clearly saw through Mr. Taveras's testimony as "inconsistent and implausible

for several reasons." (Op. p. 6, lines 14-23.) ALJ Ringler further found that DISH supervisor, Mike Durham, was "straightforward and honest, and equally helpful on direct and cross-examination", and credited his testimony that Taveras' "bump-cap" did not fall off of his head at the very moment that he arrived. Rather, Taveras had never placed the bump cap on when he traversed up the ladder.

So when the Union claims that nobody else was ever terminated solely for safety issues, the fact is that nobody else ever committed the extraordinary number of same safety violations. Had they done so, they would have been fired too. However, there is evidence in the record that other employees were disciplined for fewer safety violations. Even supervisors were let go or resigned for failing to function effectively under Mr. Gonzalez's mandate to create a safer and better workplace.

In conclusion, it is stunning that the Union continues to try to protect Mr. Taveras. He admits to having worked unsafely, he admits that he was warned about working unsafely, and he admits that he really did not care about working safely ("Go ahead and fail me." H.T. p. 239). Yet, the Union chooses to try to protect him by filing exceptions seeking his return to work. We ask, toward what end...having Mr. Taveras return and injure, or even worse, kill himself because he will not comply with the most reasonable safety requirements that are meant to keep him safe? If there ever was a person underserving of being returned to work, it is Mr. Taveras. Even the General Counsel must agree with DISH, as he did not see fit to file exceptions to ALJ Ringler's well-reasoned opinion.

Dated: January 11, 2013

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY P.C.

By _____

George Basara, Esquire
Pa I.D. #41811
george.basara@bipc.com
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410
(412) 562-1636

Counsel for Respondent,
DISH Network Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Reply to Union's Exceptions** was served to the following, via e-mail and UPS overnight mail, on this 11th day of January, 2013. Also filed and served at http://www.nlrb.gov/e-filing system.

Matt Holder, Esquire
David Van Os & Associates, P.C.
1016 La Posada, Suite #145
Austin, TX 78752

Martha Kinard, Regional Director
National Labor Relations, Board, Region 16
819 Taylor St., Rm. 8A24
Fort Worth, TX 76102-6178

Office of the Division of Judges

George Basara